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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

MICHAEL ZELENY,

Plaintiff,

vs.

GAVIN NEWSOM, *et al.*,

Defendants.

Case No. CV 17-7357 JCS

Assigned to:

The Honorable Richard G. Seeborg

Discovery Matters:

The Honorable Thomas S. Hixson

**PLAINTIFF MICHAEL ZELENY'S
NOTICE OF MOTION AND MOTION
FOR PARTIAL SUMMARY JUDGMENT
AGAINST CALIFORNIA ATTORNEY
GENERAL XAVIER BECERRA**

[Filed Concurrently:

1. Declaration of Michael Zeleny;
2. Declaration of Damion Robinson;
3. Request for Judicial Notice;
4. Proposed Order]

Date: February 25, 2021

Time: 1:30 p.m.

Courtroom: 3, 17th Floor

Action Filed: December 28, 2017

Trial Date: TBD

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 25, 2021, at 1:30 p.m., or as soon thereafter as the matter may be heard before the Honorable Richard Seeborg in Courtroom 3 of the above-entitled Court, Plaintiff Michael Zeleny ("Zeleny") will and hereby does move for an Order granting Partial Summary Judgment¹ against Defendant California Attorney General Xavier Becerra pursuant to Federal Rule of Civil Procedure 56.

This Motion is made on the grounds that there are no issues of material fact and that Zeleny is entitled to judgment as a matter of as to his Fifth Cause of Action.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points & Authorities, the Declaration of Damion Robinson filed concurrently, the records and files herein, and such other matters as the Court may consider.

Dated: January 21, 2021

Respectfully submitted,

s/ Damion Robinson

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¹ This is styled as a Motion for Partial Summary Judgment because it is not directed at Zeleny's claims against the City of Menlo Park and Police Chief Bertini for violating his rights under the First, Second and Fourteenth Amendments and corresponding Section 1983 claim. Zeleny is concurrently filing a Motion for Partial Summary Judgment against those Defendants. Taken together, both motions would resolve all issues and claims in the litigation.

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

With limited exceptions, California bans both the open and the concealed carry of firearms. Taken together, California’s prohibitions eliminate a person’s right to carry a firearm in self-defense outside the home, in violation of the Second Amendment, unless the person can qualify under one of the exceptions. At issue in this case is one of the express exceptions, authorizing the open carry of unloaded firearms during the production of a movie, television show, or other entertainment event. This exception is unconstitutionally vague if it does not apply to the activities of plaintiff Michael Zeleny (“Zeleny”).

Zeleny does not challenge California’s entire statutory scheme governing firearms. Its long list of flaws has been or is being litigated elsewhere. Instead, he seeks a judicial interpretation of a narrow aspect of those statutes, namely, the portion excepting “authorized participants” in film, television, or video productions, or entertainment events, from the “open carry” ban. Under a plain reading of those exceptions, industry practice, and guiding rules of interpretation, Zeleny must qualify. Any other interpretation would violate settled constitutional doctrine. The Court should construe California’s statutory exception in a way that is consistent with the Constitution, and issue declaratory relief accordingly. Otherwise, the ban on open carry as a whole, and the entertainment exception in particular, fail constitutional scrutiny for multiple reasons.

First, if the Second Amendment right to “bear arms” has any meaning, it prohibits California’s near-total ban on carrying firearms. Through dual bans on open carry and concealed carry, the State of California makes it a crime for an ordinary, law-abiding citizen to carry a pistol, rifle, or shotgun, loaded or unloaded, concealed or openly, virtually anywhere in this state. Under the Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and its progeny, what amounts to a categorical ban on public carry cannot withstand constitutional scrutiny.

Second, even if the open carry ban could pass constitutional muster as a whole, the “authorized participant” exception does not. The exception impermissibly distinguishes between different forms of First Amendment activity, allowing open carry in connection with movies or TV shows, but not protests, picketing, “open carry” rallies, or gun rights demonstrations. When it comes

1 to fundamental rights, such as the right to bear arms and the right to free speech, this type of content-
2 based, arbitrary line-drawing is impermissible.

3 **Third**, and finally, the “authorized participant” exception is impermissibly vague if it does
4 not include Zeleny. To pass constitutional scrutiny, a statute must be clear enough that a person of
5 ordinary intelligence could understand it by reading it. As Magistrate Judge Hixson recognized in a
6 discovery order in this case, however, the statute contains no definition of “authorized participant,”
7 or explanation of who does the authorizing, and there are no applicable regulations. The State of
8 California needed three rounds of discovery responses to finally come up with a definition—by
9 reference to a wholly-unrelated statute that has no application and is not referenced in the
10 exemption. The State could not answer a simple interrogatory coherently, and its Rule 30(b)(6)
11 designee could not define the statutory phrase “authorized participant” at his deposition, making
12 clear that he would need to do “quite a bit of research” before answering.

13 Along the same lines, Menlo Park Police Chief Dave Bertini (“Bertini”), a career law
14 enforcement officer, was more blunt: “that law is very vague.” No reasonable layperson could be
15 expected to understand a statute that high-level law enforcement personnel cannot explain even with
16 the assistance of counsel, even in the context of a take home-exam in the form of an interrogatory.

17 At minimum, Zeleny is entitled to a judicial declaration that “authorized participant” means
18 a person authorized by the producer of the film or event. Alternatively, the open carry ban, and the
19 entertainment exception, violate the First, Second, and Fourteenth Amendments and should be
20 declared unconstitutional.

21 **II. BACKGROUND**

22 Zeleny is a published author, editor, and translator, an internationally renowned blogger,
23 accomplished scholar in logic, history, literature, law, and technology, and an independent
24 performance artist and film-maker. Declaration of Michael Zeleny (“Zeleny Decl.”) ¶ 2. He is also
25 a firearms historian and author. *Id.*

26 Zeleny holds a California Certificate of Eligibility to possess firearms, and a Type 08
27 Federal Firearms License. *Id.* ¶ 3. Zeleny collects rare, unique, and historically significant guns.
28 *Id.*

1 He seeks to carry unloaded firearms as part of a series of protests against New Enterprise
 2 Associates (“NEA”), a venture capital fund in Menlo Park. As part of his protests, he plans to
 3 present a multimedia performance of images and animations, and to display rare firearms, posters,
 4 placards, and other materials. He intends to film his performance and the reaction of passersby as
 5 part of an Internet video production and documentary film. *Id.* ¶¶ 4-8.

6 Zeleny has been prevented from his protest, despite trying to comply with all laws, because
 7 the city of Menlo Park contends that he is subject to arrest for violating California’s “open carry”
 8 firearms ban unless he gets a city permit—which Menlo Park refuses to issue to him. *Id.* ¶¶ 9-10.

9 **A. California’s Comprehensive Gun Bans**

10 California imposes extensive regulations on who may obtain a firearm and how they may do
 11 so. It is generally illegal to carry “a loaded firearm on the person or in a vehicle while in any public
 12 place or on any public street in an incorporated city or in any public place or on any public street in
 13 a prohibited area of unincorporated territory.” Cal. Penal Code § 25850.² These same restrictions
 14 apply to carrying unloaded firearms openly, except for long-guns (rifles) that remain in a vehicle.
 15 *Id.* §§ 26350, 26400. Regardless of whether the firearm is loaded, California law generally
 16 prohibits possession of a concealed firearm in any place outside one’s residence, place of business,
 17 or other private property. *Id.* §§ 25400, 25605.

18 While these general prohibitions are subject to several exceptions, most apply only to
 19 narrow groups of persons such as retired peace officers or activities such as hunting in rural areas.
 20 For most Californians, the only potential exception is for “Carry License” holders, which allows
 21 individuals with a license to carry a handgun in public, subject to restrictions. *Id.* §§ 26150-26155.

22 California authorizes city police chiefs and county sheriffs (“Issuing Authorities”) to issue
 23 Carry Licenses to residents. To obtain a Carry License, the applicant must meet a host of eligibility
 24 requirements, *see id.* §§ 26165, 26185, and convince the Issuing Authority that he is of “good moral

25 ² Because California law does not define “public place, whether a location is deemed one depends
 26 on the facts of each case. Private property including one’s yard and business can still be a public
 27 place” for purposes of these restrictions. *See, e.g., People v. Cruz* (2008) 44 Cal.4th 636, 674;
 28 *People v. Yarbough* (2008) 169 Cal.App.4th 303, 318-19 (driveway is a “public place”).

character” and has “good cause” to carry a firearm. *Id.* §§ 26150(a)(1)-(2), 26155(a)(1)-(2).³ Issuing Authorities have unbridled discretion in deciding whether an applicant has “good cause”. *Erdelyi v. O’Brien*, 680 F.2d 61, 63 (9th Cir. 1982); *Nichols v. County of Santa Clara*, 223 Cal. App. 3d 1236, 1243 (1990); *CBS, Inc. v. Block*, 42 Cal. 3d 646, 665-66 (1986). Some Issuing Authorities deny Carry Licenses to virtually all applicants, while others issue them freely to any qualified applicant. *See Peruta v. County of San Diego*, 742 F.3d 1144, 1169 (9th Cir. 2014) (*Peruta II*), *vacated*, 824 F.3d 919 (9th Cir. 2016) (en banc).

In counties with populations over 200,000, Issuing Authorities can only issue licenses allowing the holder to carry a *concealed* firearm. California law prohibits them from issuing licenses to carry openly. Cal. Penal Code §§ 26150(b)(2), 26155(b)(2). If the Issuing Authority in such a county – *e.g.*, Los Angeles, where Zeleny lives, or San Mateo – has a restrictive “good cause” policy, then the typical citizen cannot obtain a license to lawfully carry at all. Without a license, he may only have a firearm in a “public place” if it is inside a container and for the sole purpose of transporting it to a vehicle or authorized location. *Id.* §§ 25505, 26405(c).

Carrying a firearm in public without a license or otherwise qualifying for one of the other limited exceptions is a misdemeanor or a felony. *Id.* §§ 25400, 25850, 26350, 26400. California provides only one affirmative defense: openly carrying for a short time interval due to a reasonable belief that they or someone else is in “immediate, grave danger.” *Id.* § 26045(a).

In sum, ordinary law-abiding citizens in California are effectively banned from carrying firearms outside their homes for self-defense or when engaged in protest, whether openly or concealed. The Constitution does not permit such constraint of fundamental rights.

³ In 2017, the California State Auditor issued an exhaustive report finding, among other things, that standards differed among licensing authorities that the authorities “failed to consistently apply their own licensing policies or standards.” *See* Request for Judicial Notice, Ex. 7. (<https://www.auditor.ca.gov/pdfs/reports/2017-101.pdf>) (hereinafter “Auditor Report”). The program has also been plagued with scandals, including “pay-to-play” issuance of permits. *See, e.g.*, CBS SF BayArea, “Concealed Weapons Permit Scandal Grows (Nov. 23, 2020) (<https://sanfrancisco.cbslocal.com/2020/11/23/concealed-weapons-permit-scandal-grows-grand-jury-indicts-santa-clara-county-undersheriff-sheriffs-captain-apple-executive/>)

1 **B. Relevant Exceptions**

2 California enacted its “open carry ban” in 2012 prohibiting the open, non-concealed carrying
3 unloaded handguns and rifles. Cal. Pen. Code §§ 23650(a)(1)(A) and (B), 26500(a)(1) and (2) (the
4 “Open Carry Ban”). On their face, these laws prohibit Californians from openly carrying unloaded
5 firearms in virtually any public place in a city or city and county, and in most unincorporated areas.

6 These statutes have exceptions. Open carry is permitted “by an authorized participant in ... a
7 motion picture, television or video production, or entertainment event, when the participant lawfully
8 uses the [firearm] as part of that production or event.” Cal. Pen. Code § 26375; Cal. Penal Code §
9 26405(r). The Penal Code does not define “authorized participant,” “motion picture, television, or
10 video production,” or “entertainment event.” It does not specify who does the authorizing. Neither
11 does it mention any criteria for authorization. See Cal. Pen. Code §§ 26375, 26405(r).

12 **III. LEGAL STANDARD**

13 A moving party is entitled to summary judgment where he can show there is no genuine
14 issue of material fact and he is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56.
15 Summary judgment follows where the non-moving party fails to “make a showing sufficient to
16 establish the existence of an element essential to that party’s case and on which the party will bear
17 the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

18 Because this motion involves issues of pure law, summary judgment is appropriate.

19 **IV. ARGUMENT**

20 **A. Zeleny Is An “Authorized Participant” Who Is Exempt from the Open Carry**
21 **Ban in Connection with His Events in Menlo Park.**

22 California Penal Code Section 26375 codifies an exemption to the Open Carry Ban:

23 Section 26350 does not apply to, or affect, the open carrying of an
24 unloaded handgun by an authorized participant in ... a motion picture,
25 television or video production, or entertainment event, when the
26 participant lawfully uses the handgun as part of that production or
event, as part of rehearsing or practicing for participation in that
production or event, or while the participant or authorized employee or
agent is at that production or event, or rehearsal or practice for that
production or event.

27 Section 26405(r) contains an identical exemption for rifles. On its face, the exception applies to
28 Zeleny using firearms as part of a multimedia performance, which he intends to film and distribute

1 as a movie on the Internet.

2 Unfortunately, California’s statutes do not define the terms included in the exemptions. They
3 do not define “authorized participant” or say who does the authorizing. Each party to this case has a
4 different interpretation of the phrase “authorized participant.” Zeleny understands it to mean a
5 person authorized by the producer of the film, television show, or event. The City interprets it to
6 mean a person authorized by the City. The State, after extensive discovery squabbling, settled on a
7 person with an Entertainment Firearms Permit under Penal Code § 29500, *et seq.*—an unrelated
8 statute nowhere referenced in the exemption.

9 Zeleny is entitled to a declaration that his interpretation is correct. It is the only
10 interpretation consistent with the plain language and purpose of the statute. It is also the only
11 interpretation that avoids insurmountable conflict with the Constitution.

12 **1. Zeleny’s Interpretation Is Consistent with the Constitution.**

13 Becerra initially refused to take a position on what the phrase “authorized participant”
14 means. *See* Robinson Decl. ¶¶ 2-4; *see also* June 9, 2020 Order, Dkt. No. 132 at p. 2. After
15 Magistrate Judge Hixson ordered him to answer, *see* Sept. 4, 2020 Order, Dkt. No. 140, and
16 Becerra unsuccessfully challenged the ruling, *see* Oct. 5, 2020 Order, Dkt. No. 148, he finally
17 provided something of an answer. *See* Robinson Decl. ¶¶ 6-7 & Exs. 1, 2.

18 His initial response was to demur:

19 Penal Code §§ 26375 and 26405, subdivision (r) do not include definitions of the
20 phrase ‘authorized participant.’ Defendant Becerra has never issued a formal opinion
21 under California law regarding the phrase ‘authorized participant’ and this response is
not such an opinion and cannot be relied upon as such an opinion.”

22 Robinson Decl., Ex. 1 at pp. 25, 26-28. Becerra took the position that a person with an
23 Entertainment Firearms Permit under Penal Code § 29500, *et seq.*, “could be” an “authorized
24 participant” within the meaning of the exemption. *Id.*, Ex. 2 at p. 4.

25 On his third try at answering, Becerra finally settled on the following:

26 Based on Defendant Becerra’s understanding of Plaintiff Zeleny’s situation, in the
27 specific context of this case, an individual who has a valid “entertainment firearms
28 permit” issued pursuant to Penal Code § 29500 would be an “authorized participant”
within the meaning of Penal Code §§ 26375 and 26405(r) for the narrow purpose of
having a defense against a prosecution of open carry laws, if that individual were

1 using the weapon as a prop in a motion picture, television, video, theatrical, or other
entertainment production or event.

2 *Id.*, Ex. 2 at pp. 4-5.

3 While Zeleny agrees with the tautology that an individual with an Entertainment Firearms
4 Permit would necessarily qualify, this definition is unduly restrictive and impermissibly
5 discriminates based on different First Amendment-protected activities. Sections 26375 and 26405(r)
6 do not refer to Entertainment Firearms Permits, as they would if such a permit were required. The
7 predecessor to section 29500 was on the books for eight years before the Open Carry Ban.

8 Instead, the Entertainment Firearm Permit addresses a different situation – *i.e.*, the **transfer**
9 of firearms from a prop house to an on-set prop master. The predecessor to section 29500, Penal
10 Code § 12081, is a workaround to a restrictive firearm-transfer policy adopted by the ATF in 2004.
11 Its purpose is to allow firearms to be temporarily loaned to production company prop masters
12 without requiring them to register as firearms dealers or complete exhaustive background checks
13 each time they receive firearms for use in a movie. The statutes do not govern the use of firearms
14 during filming, or the actors or other participants who use firearms on a film set or a stage. *See*
15 Request for Judicial Notice, Exs. 3, 4. Becerra is trying to fit this square peg in a round hole.⁴

16 Zeleny has proffered un rebutted expert testimony from two qualified experts that the
17 understanding of “authorized participant” in the movie industry is far broader, and consistent with
18 Zeleny’s interpretation of the exemption. *See* Robinson Decl. Exs. 3 and 4. According to the
19 Declarations of Michael Tristano and Robert Latham Brown—who have a combined 70-plus years
20 of experience making movies and television shows—the term “authorized participant” is interpreted
21 in the industry to include not only the prop master, but also the actors or other performers who
22 receive the firearms from the prop master for use in the production. As these experts explain, the
23 prop master is the holder of the Entertainment Firearms Permit. He or she is tasked with ensuring
24 the safe use of the firearms by the “authorized participants” – *i.e.*, the actors – and verifying that

25 _____
26 ⁴ Consistent with its purpose of exempting prop masters from federal transfer restrictions, Penal
27 Code § 29500 speaks in terms of “loaned” firearms only. Under Becerra’s interpretation, Zeleny
28 would be an “authorized participant” to use firearms he borrowed from other people, but not those
that he owns.

1 none of them are prohibited from possessing a firearm. The actors do not need permits. So long as
 2 they are not prohibited individuals, *e.g.*, felons, the identity of the “authorized participants” is
 3 irrelevant to the permitting agencies and often not determined until the day of filming. *Id.*

4 If Becerra’s interpretation were right, every extra in a movie who handled a gun—not to
 5 mention the stars—would be required to go through the time-consuming process of obtaining an
 6 Entertainment Firearms Permit before filming. To make *Die Hard*, not only would Bruce Willis
 7 need a permit, but so would every extra who pointed a gun at him for a few seconds on screen before
 8 being dispatched. Production would grind to a halt. This is not what the Legislature had in mind.

9 Zeleny previously held an Entertainment Firearms Permit. Zeleny Decl., ¶ 11 & Ex. 1. He is
 10 also an authorized participant in his multimedia productions of his protests, which are filmed and
 11 distributed on the internet. Under both the Attorney General’s definition and a proper understanding
 12 of the term “authorized participant,” Zeleny is allowed by California law to openly carry unloaded
 13 firearms during his constitutionally-protected events.⁵

14 2. Alternative Interpretations Raise Constitutional Concerns.

15 Courts “construe a penal statute as favorably to the defendant as its language and the
 16 circumstances of its application may reasonably permit.” *People v. Garcia*, 21 Cal. 4th 1, 10 (1999)
 17 (citation omitted). Under the “rule of lenity,” “when language is reasonably susceptible of two
 18 constructions ... ordinarily that construction which is more favorable to the offender will be
 19 adopted.” *People v. Ralph*, 24 Cal. 2d 575, 581 (1944); accord *Skilling v. United States*, 561 U.S.
 20 358, 410 (2010) (citation omitted). Under this rule, an “ambiguous exception to a penal statute ...
 21 must be construed liberally in favor of the persons seeking its protections.” *Bale v. San Jose Police*
 22 *Department*, 158 Cal.App.3d 168, 173-74 (1984) (avoiding constitutional vagueness by treating
 23 exception as ambiguous and construing it broadly).

24 Interpreting the “authorized participant” exception broadly is necessary to avoid

25 _____
 26 ⁵ In his Motion for Partial Summary Judgment against the City of Menlo Park and Police Chief Dave
 27 Bertini, Zeleny established that, as a matter of law, his protests constitute speech protected by the
 28 First Amendment. To the extent necessary, Zeleny incorporates those arguments and legal citations
 here by this reference.

1 constitutional invalidity. “The Supreme Court has long held that courts should interpret statutes in a
 2 manner that avoids deciding substantial constitutional questions.” *Kim Ho Ma v. Ashcroft*, 257 F.3d
 3 1095, 1106 (9th Cir. 2001) (citations omitted). This is deemed a “paramount principal of judicial
 4 restraint.” *Id.* (citation omitted). “A statute must be construed, if fairly possible, so as to avoid not
 5 only the conclusion that it is unconstitutional, but also grave doubts upon that score.” *United States*
 6 *v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (citation omitted).

7 As detailed below, an interpretation of the “authorized participant” exception that delegates
 8 authority to an unnamed government entity raises grave constitutional concerns. The statute
 9 contains no guidance for the exercise of this authority, and does not identify who has it. Each
 10 municipality could insist that its authorization is necessary and, due to the lack of guidance or
 11 regulations, set whatever requirements it chose. Without any such guidance, local authorities would
 12 have unbridled discretion to grant or deny “authorization” as they see fit. It also renders the statute
 13 unconstitutionally vague, and would violate the First, Second, and Fourteenth Amendments.

14 To avoid these questions, the party who “authorizes” a participant to carry a weapon in a
 15 production must be the producer of the film, television show, or event, rather than an unspecified
 16 government agency or agencies.

17 **B. Zeleny Has Standing to Challenge the Constitutionality of the Open Carry Ban.**

18 Zeleny has directly experienced the effect of California’s Open Carry Ban. Zeleny is an
 19 adult resident of Los Angeles County and is qualified to possess firearms under Federal and
 20 California law. Zeleny Decl. ¶ 12. He currently possesses firearms lawfully. *Id.* ¶ 3.

21 The Sheriff of Los Angeles County, Alex Villanueva, is the sole Issuing Authority for
 22 Zeleny. Cal. Penal Code § 26150. Because Los Angeles County’s population exceeds 200,000, a
 23 license to openly carry is completely unavailable. For a concealed carry license, county policy
 24 requires a particularized need to carry a handgun in public. Specifically, to even potentially satisfy
 25 the “good cause” standard, an applicant must provide:

26 Sufficient evidence of potential danger to life or of great bodily harm
 27 to the applicant, his or her spouse or dependent child, which cannot be
 28 adequately dealt with by existing law enforcement resources and
 which danger cannot be reasonably avoided by alternative measures,
 and which danger would be significantly mitigated by the applicant's

carrying of a concealed firearm.

Los Angeles County Manual of Policy and Procedures, § 5-09/380.10. Owing to this extremely restrictive standard, as of 2017, Los Angeles County had 197 licenses in circulation out of a population of 10.2 million. Request for Judicial Notice, Ex. 7, p. 7; *see also* Robinson Decl., Ex. 6 at ¶ 14-16 (“Mr. Zeleny has zero likelihood of successfully obtaining a [concealed carry] permit”).

But for California’s comprehensive and unconstitutional restrictions on carrying firearms, and Zeleny’s practical inability to obtain a Carry License, Zeleny would lawfully carry a firearm in non-sensitive public places for self-defense and during his constitutionally-protected protests. He refrains from doing so for fear of criminal prosecution for violating one or more of California’s laws regulating carrying a firearm. Zeleny Decl. ¶¶ 13-14.

C. The Open Carry Ban Violates the Second Amendment.

1. Framework for Second Amendment Analysis.

In *Heller*, the Supreme Court held that the Second Amendment protects an “individual right to possess and carry weapons” for self-defense. 554 U.S. at 592. The Court struck down a District of Columbia ordinance banning the possession of handguns under “any of the standards of scrutiny that we have applied to enumerated constitutional rights”—that is, any standard stricter than rational basis. *Id.* at 628 & n.27.

In *McDonald v. City of Chicago* (2010) 561 U.S. 742, the Court extended *Heller*, finding that the Second Amendment is “fully applicable to the States,” *id.* at 750, because it is “among those fundamental rights necessary to our system of ordered liberty.” *Id.* at 778. States may not “enact any gun control law that they deem to be reasonable.” *Id.* at 783 (plurality); *see also Caetano v. Massachusetts*, __ U.S. __, 136 S. Ct. 1027 (2016).

In the years since *Heller* and *McDonald*, the Ninth Circuit has developed a two-step framework for Second Amendment claims. A court first “asks if the challenged law burdens conduct protected by the Second Amendment, based on a historical understanding of the scope of the right.” *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (citing *Heller*, 554 U.S. at 625). If yes, the court analyzes the law under heightened scrutiny, with the degree of scrutiny varying depending on “how close the challenged law comes to the core of the Second Amendment right,

1 and ... the severity of the law’s burden on that right.” *Id.* (citing *Jackson v. City & County of San*
 2 *Francisco*, 746 F.3d 953, 960-61 (9th Cir. 2014)).

3 The court need not determine the applicable level of scrutiny, however, if a law “amounts to
 4 a destruction of the Second Amendment right,” as such a law “is unconstitutional *under any level of*
 5 *scrutiny.*” *Jackson*, 746 F.3d at 961 (emphasis added). After all, “[t]he very enumeration of the right
 6 takes out of the hands of government ... the power to decide on a case-by-case basis whether the
 7 right is *really worth* insisting upon.” *Heller*, 554 U.S. at 634. The Second Amendment is not “a
 8 second-class right, subject to an entirely different body of rules than the other Bill of Rights
 9 guarantees.” *McDonald*, 561 U.S. at 780. In short, the Second Amendment is “a real constitutional
 10 right. It’s here to stay.” *Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017).

11 **2. California Law Infringes the Second Amendment by Barring Virtually** 12 **Any Bearing of Firearms Outside of the Home.**

13 California law prohibits Zeleny and other conscientious, law abiding citizens from carrying a
 14 loaded or unloaded firearm in virtually any public place in the state. The critical question is whether
 15 the Second Amendment protects a right to carry firearms that extends beyond the home. *Silvester*,
 16 843 F.3d at 821. The text, structure, purpose, and history of the Second Amendment all confirm that
 17 it does. Precedent reinforces that conclusion. No federal court (at least without provoking reversal)
 18 has accepted the theory that the right is confined to the home.

19 **a. The Text, Structure, and Purpose of the Second Amendment** 20 **Confirm That the Right to Bear Arms Extends to Public Places.**

21 Any inquiry into the Second Amendment must begin with its text. *See Heller*, 554 U.S. at
 22 576. That text provides: “A well regulated Militia, being necessary to the security of a free State, the
 23 right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II.

24 The text protects two separate rights: the right to “keep,” and the right to “bear.” *Heller*, 554
 25 U.S. at 591. Under *Heller*’s binding construction, to “keep arms” means to “have weapons.” *Id.* at
 26 582. To “bear arms” means to “carry” a weapon for “confrontation”—to “wear, bear, or carry” a
 27 firearm “upon the person or in the clothing or in a pocket, for the purpose ... of being armed and
 28 ready for offensive or defensive action in a case of conflict.” *Id.* at 584 (quoting *Muscarello v.*

1 *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

2 As every court to address the issue post-*Heller* has confirmed, the right extends beyond the
3 home. “To speak of ‘bearing’ arms within one’s home would at all times have been an awkward
4 usage.” *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012); *see Grace v. District of Columbia*,
5 187 F.Supp.3d 124, 135 (D.D.C. 2016), *vacated on other grounds*, *Wrenn v. District of Columbia*,
6 864 F.3d 650 (D.C. Cir. 2017) (“[R]eading the Second Amendment right to ‘bear’ arms as applying
7 only in the home is forced or awkward at best, and more likely is counter-textual.”).

8 The far “more natural to view the Amendment’s core as including a law-abiding citizen’s
9 right to carry common firearms for self-defense beyond the home.” *Wrenn*, 864 F.3d at 657. After
10 all, “the idea of carrying a gun ‘in the clothing or in a pocket, for the purpose . . . of being armed and
11 ready,’ does not exactly conjure up images of father stuffing a six-shooter in his pajama’s pocket
12 before heading downstairs to start the morning’s coffee[.]” *Peruta II*, 742 F.3d at 1152. Bearing
13 arms necessarily connotes carrying them in a public place. *Id.*

14 Confining the right to “bear arms” to the home would render it duplicative of the separately
15 protected right to “keep” arms. That would contradict the foundational principle that no “clause in
16 the constitution is intended to be without effect.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137
17 (1803). In short, the proper reading of the right to bear arms includes public carry.⁶

18 Limiting the right to the home is irreconcilable with its “*central component*” – *i.e.*, self-
19 defense. *Heller* 554 U.S. at 599 (majority); *see Id.* at 594 (“right to enable individuals to defend
20 themselves”); *Id.* at 616 (“individual right to use arms for self-defense”); *Id.* at 628 (“inherent right
21 of self-defense”). The need for self-defense is obviously “not limited to the home.” *Moore*, 702 F.3d
22 at 936. To the contrary, “the need for [self-defense] might arise beyond as well as within the home.”

23 ⁶ That proper reading is reinforced by the amendment’s structure. As *Heller* explained, the Second
24 Amendment’s prefatory clause— “[a] well regulated Militia, being necessary to the security of a free
25 State”—performs a “clarifying function” with respect to the meaning of the operative clause. 554
26 U.S. at 577-78. Here, the prefatory clause’s reference to “the Militia” clarifies that the operative
27 clause’s protection of the right to “bear Arms” encompasses a right that extends beyond the home.
28 Militia service necessarily includes bearing arms in public. And, all the Justices in *Heller* agreed
that the right to bear arms was codified, at least in part, to ensure the viability of the militia. *See Id.*
at 599, and 637 (Stevens, J., dissenting). The Court thus unanimously agreed that one critical aspect
of the right to bear arms extends beyond the home.

1 *Wrenn*, 864 F.3d at 657; *accord Heller*, 554 U.S. at 679 (Stevens, J., dissenting).

2 Both precedent and empirical data make clear that the need for self-defense is *more likely to*
 3 arise outside of the home. In America’s early days, for example, “one would need from time to
 4 time to leave one’s home to obtain supplies from the nearest trading post, and en route one would
 5 be as much (probably more) at risk if unarmed as one would be in one’s home unarmed.” *Moore*,
 6 702 F.3d at 936. The “right to keep and bear arms for personal self-defense in the eighteenth
 7 century” therefore “could not rationally have been limited to the home.” *Id.* The same is true today.
 8 Statistics compiled by the federal government show that most violent crimes “occur on the street or
 9 in a parking lot or garage” rather than “in the victim’s home.” *Grace*, 187 F.Supp.3d at 135. A
 10 substantial majority of rapes, armed robberies, and serious assaults occur outside the home. *See*
 11 Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition*
 12 *and the Scope of “Bearing Arms” for Self-defense*, 61 Am. U. L. Rev. 585,610-11 (2012) (*citing*
 13 Bureau of Justice Statistics, U.S. Dep’t of Justice, *Criminal Victimization in the United States, 2007*
 14 *Statistical Tables* tb1.62 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf>).

15 As the Seventh Circuit put it, “a Chicagoan is a good deal more likely to be attacked on a
 16 sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.”
 17 *Moore*, 702 F.3d at 937. Likewise, a “woman who is being stalked or has obtained a protective
 18 order against a violent ex-husband is more vulnerable to being attacked while walking to or from
 19 her home than when inside.” *Id.* “To confine the right to be armed to the home is [thus] to divorce
 20 the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.” *Id.*

21 **b. The History of the Second Amendment Shows That the Right**
 22 **Extends Beyond the Home.**

23 The “historical background” of the Second Amendment “strongly confirm[s]” that the right
 24 to bear arms extends beyond the home. *Heller*, 554 U.S. at 592. Many of the sources that *Heller*
 25 consulted to determine that the Second Amendment protects an individual right also show that the
 26 right extends beyond the home. *Wrenn*, 864 F.3d at 658.

27 The Second Amendment traces its roots to England, where Blackstone described “the right
 28 of having and using arms for self-preservation and defence” as “one of the fundamental rights of

Englishmen.” *Heller*, 554 U.S. at 594 (quoting I Blackstone 136, 139-40 (1765)). The fundamental right to use arms for “self-preservation and defense” necessarily includes the right to carry firearms outside the home due to the need for self-defense. English authorities made clear that “the killing of a Wrong-doer ... may be justified ... where a Man kills one who assaults him *in the Highway* to rob or murder him.” 1 William Hawkins, *A Treatise of the Pleas of the Crown* 71 (1762) (emphasis added); *see also* 1 Matthew Hale, *Historia Pacitorum Coronae* 481 (Sollum Emlyn ed. 1736) (“If a thief assault a true man either abroad or in his house to rob or kill him, the true man ... may kill the assailant, and it is not felony.”).

The need to carry for self-defense was even greater in an early America dominated by “wilderness” and other dangers. *Moore*, 702 F.3d at 936. “[I]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side.” *Grace*, 187 F.Supp.3d at 137 (quoting 5 George Tucker, *Blackstone’s Commentaries*, app., n.B, at 19 (1803). “[I]t is unquestionable that the public carrying of firearms was widespread.” *Id.* at 136. Many of the Founding Fathers carried firearms in public and spoke in favor of the right to do so—a strong indication that the right was not limited to the home. *Id.* at 136-37. Indeed, in many parts of early America, “carrying arms publicly was not only permitted—it was often *required*.” *Id.*; *see also* Nicholas J. Johnson, *et. al.*, *Firearms Law and the Second Amendment* 106 (2012) (“[A]bout half the colonies had laws requiring arms-carrying in certain circumstances.”).

Early American cases, including many cited in *Heller*, make clear that the Second Amendment included the right to bear arms *in public*. The nineteenth century cases are comprehensively analyzed by *Peruta II*, 742 F.3d at 1155-66, which concluded that “the majority of nineteenth century courts agreed that the Second Amendment right extended outside the home and included, at minimum, the right to carry an operable weapon in public for the purpose of lawful self-defense.” *Id.* at 1160; *see also* O’Shea, *supra*, at 590 (“American courts applying the individual right to bear arms for the purpose of self-defense have held with near-uniformity that this right includes the carrying of handguns and other common defensive weapons outside the home.”).

The critical point is that the Second Amendment requires “*some form* of carry for self-

defense outside the home.” *Peruta II*, 742 F.3d at 1172. The Georgia Supreme Court’s decision in *Nunn v. State*, 1 Ga. 243 (1846), lauded by *Heller*, 554 U.S. at 612, is illustrative. There, the court held a state statute “valid” in prohibiting concealed carry, but to the extent the law “contains a prohibition against bearing arms *openly*,” the court explained, it “is in conflict with the Constitution, and *void*.” 1 Ga. 251. Numerous other cases relied upon by *Heller* followed the same approach. 554 U.S. at 613, 629 (*citing Andrews v. State*, 50 Tenn. 165, 187 (1871); *State v. Chandler*, 5 La. Ann. 489 (1850); *State v. Reid*, 1 Ala. 612 (1840)). The few cases that reached a different result have been “sapped of authority by *Heller* ... because each of them assumed that the Amendment was only about militias and not personal self-defense.” *Wrenn*, 864 F.3d at 658.

c. Precedent Confirms That the Right Extends Beyond the Home

Numerous federal courts have analyzed the scope of the Second Amendment in depth and concluded that it extends to some form of carry outside the home. *See Id.* at 657-64; *Moore*, 702 F.3d at 935-36; *Grace*, 187 F.Supp.3d at 135-38; *Palmer v. District of Columbia*, 59 F.Supp.3d 173, 181-82 (D.D.C. 2014). Even courts of appeals that ultimately upheld carry restrictions did not hold the Second Amendment inapplicable. The Second Circuit, for example, concluded that the Second “Amendment must have some application in the ... context of the public possession of firearms.” *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012).

That consensus is not surprising, as *Heller* strongly suggests that the Second Amendment applies outside the home. For instance, when the Court looked for past restrictions as severe as the District’s handgun ban, it deemed restrictions on carrying firearms outside the home most analogous, noting with approval that “some of those [restrictions] have been struck down.” *Heller*, 554 U.S. at 629. Such laws could hardly represent “severe” restrictions if the Second Amendment’s protection did not include public carry. *Id.* And when the Court identified certain “presumptively lawful” restrictions, it included “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Id.* at 626-27 & n.26. The Court would not need to call out those public places as sites of permissible restrictions if there was no right to carry in public at all.

The principles applied in *Heller* apply beyond the specific statute struck down in that case. Federal courts, particularly the Supreme Court, decide cases according to “general principles” that

1 apply beyond the fact patterns at hand. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, __U.S.
 2 __, 137 S. Ct. 2012, (2017) (Gorsuch, J., concurring). Nothing in *Heller* suggests that the Court’s
 3 decision is uniquely confined to the home, or that lower courts can avoid applying the principles the
 4 Court enunciated—an obligation the Ninth Circuit has acknowledged in applying *Heller* to fact
 5 patterns beyond possession in the home. *See Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015)
 6 (possession of large-capacity magazines); *Jackson*, 746 F.3d at 967 (ammunition purchases).

7 Ninth Circuit precedent is in accord. The only Ninth Circuit opinion to squarely discuss the
 8 question of public carry concluded that the right to bear arms requires states to “permit *some form*
 9 of carry for self-defense outside the home.” *Peruta II*, 742 F.3d at 1172. Candidly, the panel
 10 decision in *Peruta II* was subsequently superseded by an *en banc* decision finding no right to
 11 *concealed* carry. The *en banc* court, however, reserved the question of “whether the Second
 12 Amendment protects *some ability* to carry firearms in public.” *Id.* (emphasis added); *see also id.* at
 13 939, 942. *See Peruta v. County of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (*Peruta III*).
 14 Indeed, California conceded that a state may not be able to “categorically” ban carry beyond the
 15 home. *Peruta III*, 824 F.3d at 919. *Peruta II* remains the only Ninth Circuit decision to squarely
 16 address the question, and it continues to be cited frequently as persuasive authority. *See, e.g.,*
 17 *Wrenn*, 864 F.3d at 658, 663-64; *Grace*, 187 F.Supp.3d at 130 n.2.

18 3. Banning Carry Beyond the Home Fails Under Any Level of Scrutiny.

19 Concluding that the right to bear arms extends beyond the home all but resolves this case.
 20 California’s wholesale denial of a right protected by the Second Amendment “fail[s] constitutional
 21 muster” under “any of the standards of scrutiny.” *Heller*, 554 U.S. at 628-29. Whether this Court
 22 applies the categorical approach that *Heller* demands, or one of the levels of heightened scrutiny, the
 23 result is the same: California’s refusal to allow its citizens to carry guns in public, outside of their
 24 homes, is unconstitutional.

25 a. California’s *De Facto* Ban on Carry by Law-Abiding Citizens Is 26 Categorically Invalid.

27 Because California denies citizens any ability to carry outside the home, there is no need to
 28 determine the applicable level of scrutiny. A law that completely denies a protected right “fail[s]

1 constitutional muster” under “any of the standards of scrutiny.” *Id.* That is the approach *Heller*
2 took in striking down a total denial of the right to keep arms and it is the approach numerous courts
3 have taken in striking down bans on the right to bear them. *See Wrenn*, 864 F.3d at 664-66; *Peruta*
4 *II*, 742 F.3d at 1175; *Moore*, 702 F.3d at 941-42; *Palmer*, 59 F.Supp.3d at 182-83. It is also an
5 approach that a unanimous Ninth Circuit panel endorsed in *Jackson*, noting that a law that “amounts
6 to a destruction of the Second Amendment right, is unconstitutional under any level of scrutiny.”
7 746 F.3d at 961. Because California law prevents Zeleny from publicly carrying a firearm in any
8 capacity, it “amounts to a destruction” of his right to bear arms, and is thus “unconstitutional under
9 any level of scrutiny.” *Id.*

10 The fact that California’s scheme is riddled with a laundry list of exceptions does not
11 improve matters. The Second Amendment guarantees the right to keep and bear Arms to “the
12 people,” not just to retired peace officers or other subsets of the people the state deems worthy. The
13 right to bear arms can no more be limited to such individuals than the right to free speech can be
14 limited to paid newspaper columnists. *See, e.g., First Nat’l. Bank of Boston v. Bellotti*, 435 U.S.
15 765, 777 (1978) (speech protection “does not depend upon the [speaker’s] identity”). Indeed, the
16 possession ban at issue in *Heller* had “minor exceptions” for certain people, such as retired police
17 officers, *see* 554 U.S. at 575 n. 1, but the Court still characterized it as a “complete prohibition.” *Id.*
18 at 629. The same result applies here. The ban “on the ability of most citizens to exercise an
19 enumerated right would have to flunk any judicial test that was appropriately written and applied.”
20 *Wrenn*, 864 F.3d at 666.

21 California’s exception for Carry Licenses holders is likewise inapposite. If California law
22 required Issuing Authorities to recognize self-defense as “good cause” to obtain a Carry License,
23 then that exception would provide ordinary citizens with an opportunity to exercise their right. But,
24 the State does not impose such a limitation. Sheriff Villaneuva has chosen to adopt a near-
25 impossible “good cause” requirement. So, the Carry License exception is no exception at all, at
26 least not for an ordinary citizen like Zeleny.

27 Nor is California’s narrow affirmative defense to criminal prosecution for an individual
28 facing “immediate, grave danger” a meaningful caveat. That defense is not only limited to “grave

1 danger,” but it applies *only* during “the brief interval” between when law enforcement officials are
 2 notified of the “grave danger” and when they arrive. Cal. Penal Code §§ 26045(a)-(c). Since an
 3 individual is prohibited from having an unloaded firearm on or near his person, “where the fleeing
 4 victim would obtain a gun during that interval is apparently left to Providence.” *Peruta II*, 742 F.3d
 5 at 1147, n.1. More fundamentally, the notion that the right to bear arms is sufficiently
 6 accommodated by a potential affirmative defense cannot square with the Supreme Court’s
 7 admonishments that the Second Amendment protects a right to be “armed and ready” in case of
 8 confrontation. *Heller*, 554 U.S. at 584 (*quoting Muscarello*, 524 U.S. at 143).

9 Finally, while there are portions of unincorporated areas where it is legal to openly carry a
 10 firearm, in reality these are tiny islands in a sea of “prohibited areas.” Cal. Penal Code §§ 17030,
 11 28350(a)(1)(C). “Prohibited areas” generally include any public road or highway, as well as
 12 anywhere within 150 yards of any building. The State also designates certain areas it controls as
 13 “prohibited areas.” Municipalities typically create additional “prohibited areas” via ordinance. The
 14 City of Menlo Park, for example, prohibits any person from “having in his possession within this
 15 city ... any firearm[,]” subject to narrow exceptions. Menlo Park Municipal Code § 8.32.010.

16 In short, for ordinary individuals, California’s prohibitions are tantamount to a flat ban on
 17 publicly carrying firearms. Because such a flat ban “amounts to a destruction” of the right,
 18 California’s carry prohibitions are “unconstitutional under any level of scrutiny.” *Jackson*, 746 F.3d
 19 at 961 (citing *Heller*, 554 U.S. at 629).

20 **b. California’s Effective Ban on Carry by Ordinary, Law-abiding**
 21 **Citizens Is Invalid Under Either Strict or Intermediate Scrutiny.**

22 If the Court applies one of the traditional levels of scrutiny, it should apply strict scrutiny. In
 23 the Ninth Circuit, a “law that implicates the core of the Second Amendment right and severely
 24 burdens that right warrants strict scrutiny.” *Silvester*, 843 F.3d at 821. The “core Second
 25 Amendment right” is the “right of self-defense,” *Jackson*, 746 F.3d at 968; *see Heller*, 554 U.S. at
 26 599, and restrictions on bearing arms beyond the home clearly “implicate” that core right. *Silvester*,
 27 843 F.3d at 821. By any measure, a complete ban “severely burdens” the right to bear arms for self-
 28 defense. *Silvester*, 843 F.3d at 821. Accordingly, strict scrutiny applies.

1 Ultimately, however, this Court need not resolve whether strict or intermediate scrutiny
 2 applies, because California’s carry ban fails either standard. *Cf McCutcheon v. FEC*, __U.S.__, 134 S.
 3 Ct. 1434 (2014) (plurality opinion). Intermediate scrutiny requires a “reasonable fit between the
 4 challenged regulation” and a “significant, substantial, or important” government objective. *Silvester*,
 5 843 F.3d at 821-22; *Jackson*, 746 F.3d at 965. The government “bears the burden of justifying its
 6 restrictions” and “must affirmatively establish the reasonable fit” required. *Jackson*, 746 F.3d at
 7 965. While a reasonable fit “is not necessarily perfect,” it must be “a means narrowly tailored to
 8 achieve the desired objective.” *McCutcheon*, 134 S. Ct. at 1456-57.

9 Prohibiting ordinary citizens from carrying firearms is not a reasonably tailored means of
 10 furthering the State’s stated objective of public safety. To the contrary, a flat ban is the exact
 11 opposite of tailoring—as evidenced by the litany of exceptions. Applying intermediate scrutiny, the
 12 Ninth Circuit stressed the distinction between laws that completely prohibit protected conduct and
 13 those that leave open “alternative channels” for that conduct. *Jackson*, 746 F.3d at 968. California
 14 law does **not** leave open alternative channels to bear arms for self-defense outside the home.
 15 Instead, it flatly denies the right to all but those who can demonstrate—to the satisfaction of an
 16 Issuing Authority with unlimited discretion – “good cause,” a criterion that “says nothing about
 17 whether he or she is more or less likely to misuse a gun.” *Grace*, 187 F.Supp.3d at 149.

18 California’s carry ban thus can be justified only on the theory that allowing law-abiding
 19 citizens to carry firearms creates an intolerable public safety risk. Not only is that theory lacking in
 20 empirical support, *see, e.g., Moore*, 702 F.3d at 937-42, and belied by the State’s recognition of the
 21 value of providing for Carry Licenses and an affirmative defense for “immediate” “grave danger”; it
 22 is a theory that the Second Amendment takes “off the table.” *Heller*, 554 U.S. at 635-36. The
 23 Framers well understood that carrying firearms in public poses safety risks, but they protected the
 24 right anyway. The State may disagree, but it has no more authority to second guess this right than it
 25 does to override the protection against unreasonable searches and seizures or coerced confessions,
 26 the right to confront adverse witnesses, or any other of right with “disputed public safety
 27 implications.” *McDonald*, 561 U.S. at 783 (plurality opinion). The Second Amendment “is the very
 28 *product* of an interest balancing by the people,” and California many not “conduct [it] for them

1 anew.” *Heller*, 554 U.S. at 635; *cf. United States v. Stevens*, 559 U.S. 460, 470 (2010) (“Our
 2 Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is
 3 not worth it.”).

4 **D. The Entertainment Exemptions Violate Due Process and Equal Protection.**

5 California’s “entertainment exemptions” to its Open Carry Ban violate Fourteenth
 6 Amendment due process and equal protection because they (i) implicate a fundamental right while
 7 simultaneously treating California citizens differently under the law and making content-based
 8 distinctions; and (ii) are void for vagueness because they do not provide fair notice as to what is
 9 required to take advantage of the exemption. Under either theory, the exemptions cannot be
 10 constitutionally applied as drafted and interpreted by the State.

11 **1. The Entertainment Exemptions Impermissibly Treat Movie Studios and**
 12 **Production Companies Differently than Protestors and Advocates.**

13 The Penal Code exemptions for “authorized participants” in a movie, television show,
 14 theatrical production, or other “entertainment event,” implicate two fundamental rights: the Second
 15 Amendment right to bear arms, and the First Amendment right of freedom of speech. By
 16 establishing these exemptions, California law impermissibly and arbitrarily disadvantages one group
 17 of speakers over another, based in large part on the content of their speech.

18 Strict scrutiny applies when a legislative classification “impermissibly interferes with the
 19 exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.” *Mass.*
 20 *Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Such classifications are presumed
 21 unconstitutional and will survive strict scrutiny only when the government can show the law is
 22 narrowly tailored to a compelling governmental interest. *See Zablocki v. Redhail*, 434 U.S. 374,
 23 388 (1978) (“[w]hen a statutory classification significantly interferes with the exercise of a
 24 fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests
 25 and is closely tailored to effectuate only those interests”).

26 The entertainment exceptions impermissibly distinguish between different forms of First
 27 Amendment speakers, drawing a line between those engaged in “entertainment” – *i.e.*, movies, TV
 28 shows, and theatrical performances – and in other forms of protected speech – *i.e.*, protests, firearm

1 training courses, “open carry” demonstrations, or gun-rights advocacy. Neither the statute itself nor
 2 its legislative history gives any valid justification for this distinction between forms of
 3 constitutionally-protected speech. The Legislature gave no reasons for the exemption, and it does
 4 not appear that it considered other forms of expressive conduct at all. Robinson Decl., Ex. 1 at pp.
 5 23-24. To the extent that the exception is intended, as it appears, to help the lucrative entertainment
 6 industry, this type of distinction is constitutionally impermissible. *See Branzburg v. Hayes*, 408
 7 U.S. 665, 704 (1972).

8 The exemption violates the First Amendment by making a content-based distinction
 9 between the free speech rights of movie studios and production companies and other, core forms of
 10 First Amendment activity. Such a distinction is not permissible. *See Ward v. Rock Against Racism*,
 11 491 U.S. 781, 791 (1989) (restrictions must be justified “without reference to the content of the
 12 regulated speech”) (*quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293
 13 (1984)). As the famous phrase states, “liberty of the press is the right of the lonely pamphleteer
 14 who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who
 15 utilizes the latest photocomposition methods.” *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972). The
 16 State cannot identify any compelling state interest justifying content-based distinctions between
 17 major movie studios and a lone protestor.

18 Further, the exemptions violate the Second Amendment by respecting the rights of big
 19 movie studios and production companies, while denying those same rights to gun rights advocates.
 20 Regulations which serve to disadvantage certain groups, or advantage certain groups over others,
 21 are subject to strict scrutiny, *see Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), and
 22 would rarely, if ever, be constitutional. Here, the State cannot identify a compelling interest
 23 justifying this disparate treatment, nor that the exemptions are narrowly tailored.

24 **2. The Entertainment Exemptions Are Unconstitutionally Vague.**

25 “A fundamental principle in our legal system is that laws which regulate persons or entities
 26 must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Studios, Inc.*,
 27 567 U.S. 239, 253 (2012) (*citing Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). A
 28 law is impermissibly vague if it “fails to provide a person of ordinary intelligence fair notice of

1 what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory
 2 enforcement.” *Id.* See also *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (“As generally
 3 stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with
 4 sufficient definiteness that ordinary people can understand what conduct is prohibited and in a
 5 manner that does not encourage arbitrary and discriminatory enforcement.”); *Village of Hoffman*
 6 *Estates v. Flipside*, 455 U.S. 489 (1982).

7 The entertainment exceptions give no indication of what is meant by an “authorized
 8 participant.” A person of reasonable intelligence could not reasonably be expected to know what it
 9 means. As Judge Hixson noted, “[u]nhelpfully, there is no statutory definition of an ‘authorized
 10 participant,’ nor a provision stating who does the authorizing. There are no governing regulations
 11 either.” Sept. 4, 2020 Order, Dkt. No. 140, at p. 1. The total absence of clarifying text or
 12 regulations renders the statutes unduly vague.

13 Case in point, each participant in this case—all individuals of at least ordinary intelligence,
 14 and the State of California itself—have come to contrary conclusions on what the phrase
 15 “authorized participant” means. The Attorney General served no fewer than *three* sets of
 16 supplemental responses before settling on a definition, referring to an entirely different and
 17 inapplicable statutory scheme. Robinson Decl. ¶¶ 2-9 & Ex. 1 at 25-28. Even then, the he included
 18 so many qualifications that its definition is essentially meaningless. That the State cannot come up
 19 with a coherent definition with three tries and two Court orders speaks volumes.

20 Likewise, defendants’ Rule 30(b)(6) designees acknowledged that the statute is vague and
 21 uncertain. Bertini, a career law enforcement officer and a police chief, was asked about the
 22 exception. Robinson Decl., Ex. 5 at p. This was his response:

23 Well, that’s the question we were trying to get answered through the
 24 Department of Justice, the district attorney’s office, et cetera. ***Because***
 25 ***that law is very vague***, we were trying to determine whether that’s true
 26 or not. And, as it stands today, our reading of the exemption is yes, if
 he was permitted under the – under the special events or film permit,
 then he could openly carry weapons.

27 *Id.* at 428:18-429:4 (emphasis added). If State and local officials can’t come up with a definition for
 28 implementation of a statute, necessarily the statute is impermissibly vague.

Further, to the extent that the statute vests authority in local permitting agencies to “authorize” participants, with no guiding standards, it is equally unconstitutional on vagueness grounds. The phrase “authorized participant” gives local agencies no guidance. Nor are there any regulations or an official interpretation. A statute that gives local agencies carte blanche to authorize participants, without any guidance, is necessarily “so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Fox Television*, 567 U.S. at 253

More fundamentally, the Rule 30(b)(6) designee of the State of California, Blake Graham, could not explain what the statute means either. Graham is a special agent in charge for the California Department of Justice, and the State’s go-to expert on its gun control regulations. Robinson Decl., Ex. 7 at p 13:20-14:20. He would certainly qualify as a person of “at least ordinary intelligence.” During his deposition, he also was unable to come up with a coherent definition of the phrase “authorized participant,” stating that he would “have to do *quite a bit of research* before he could come up with something” on what “authorized participant” means. *Id.* at 116:22-117:13 (emphasis added); *see also id.* at 127:13-128:1. If the State’s expert on gun regulations cannot tell what the statute means, a reasonable layperson cannot possibly be expected to do so.

The Penal Code recognizes an exemption to the Open Carry Ban, but it is so vague and standardless that no official entity, from either the State or Menlo Park, could explain who is covered and how to qualify. As such, it fails to provide due process to an individual, like Zeleny, seeking to invoke the exemption and allows for discriminatory enforcement by the State. The exemptions are unconstitutionally vague. A circular definition that confers favoritism on the entertainment industry does not cure the constitutionally fatal deficiencies of the statutes.

V. CONCLUSION

For all the foregoing reasons, Zeleny’s Motion for Partial Summary Judgment should be granted.

Dated: January 21, 2021

Respectfully submitted,

s/ Damion Robinson

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PROOF OF SERVICE

I hereby certify that on January 21, 2021, I electronically filed the foregoing document using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will send a notice of electronic filing to the interested parties.

s/ Gabrielle Bruckner
Gabrielle Bruckner